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SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION. By Robert L. Cord. New York: Lambeth Press. 1982. Pp. xv, 302. $16.95.

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BOOK REVIEW

SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION. By Robert L. Cord. New York: Lambeth Press. 1982. Pp. xv, 302. $16.95.

*Reviewed by Mark Tushnet**

Every discipline must have its cranks: mathematicians who prove Fermat's Last Theorem, physicists who construct perpetual motion machines, historians who establish that Lincoln was assassinated as a result of a conspiracy led by Edwin Stanton. *Separation of Church and State: Historical Fact and Current Fiction* by Robert L. Cord is a work of crank constitutional law, but it may be used to illustrate some characteristics of the crank genre.

I discuss them in no particular order. First, there is typographical eccentricity. Throughout the book Cord italicizes the word *Constitution* for no apparent reason. As I read the book a suspicion began to take shape, which was confirmed when I saw that Cord also italicizes *New Testament* (p. 162). The book is published by a press whose list includes many religious works, and its designers—with whom Cord must have concurred—regarded it as sensible to continue here the usual practice in religious books of italicizing the name of the central object of veneration.[1] That of course reveals something about Cord's view of constitutional law.

A second characteristic of cranks is that they take seriously problems or positions that those more central to the field consider risible. Thus, Cord's main argument is that Justice Black's view of the history of the religion clauses, as expressed in his opinion in *Everson v. Board of Education*,[2] was wrong, especially in attributing to Thomas Jefferson and James Madison a principled and consistent strict separationist position. Instead, Cord argues, the framers, including Jefferson and Madison, "all used, in one way or another, what they viewed as nonpreferential sectarian means to reach secular governmental ends" (p. xiv). Black's view of history must be combatted, according to Cord, because it has been deeply influential, pervading "most" of the Supreme Court's decisions "for more than three decades," that is, from 1947 to the present (id.). I leave for later Cord's historical analysis and the implications he draws from it. For now the point is much simpler. For reasons I need not go into here, shortly

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1. Note also the chapter titles, each of which contains a biblical or liturgical phrase.

2. 330 U.S. 1, 67 S. Ct. 504 (1947).

after reading Cord's book, I read fifty leading articles on the law of church and state published since 1960. I think it fair to say that not more than one or two took as central to its argument Black's view of history. If the Court and commentators have been insufficiently receptive to accommodations between church and state, it has not been because they have been overwhelmed by Black's historical argument.[3] Refuting Black's historical argument therefore does not undermine whatever it is that has led people down what Cord regards as the wrong path. This is not to say that history is irrelevant to the discussion. But its relevance is different from, and more complex than, what Cord thinks it is.

We can approach that complexity by noting a third characteristic of interesting cranks. Typically they get their energy by discovering something neat—Norman Mailer calls them "factoids"—that more standard approaches overlook. In Cord's case it is a series of legislative actions taken in the early years of the Republic, that are inconsistent with a strict separationist view. The early national government entered into a number of treaties with Native Americans in which it agreed to support religion by direct subventions of religious institutions, for example by paying the salary of a Roman Catholic priest (pp. 38-39; see also pp. 57-61). Congress also gave direct grants to religious organizations to support their efforts to educate Native Americans in church schools where, it was assumed, proselytizing would also occur (pp. 62-79). I suppose that those familiar with *Quick Bear v. Leupp*,[4] which involved the use of federal funds held in trust for or appropriated by Congress to fulfill treaty obligations to Native Americans to satisfy a contract for their education with a Roman Catholic organization, should have expected that it had its predecessors. Cord has nonetheless done a valuable service in compiling the earliest examples of such actions.

Like other cranks, though, Cord makes far too much of these examples. Certainly they weaken the historical case for the most rigid separationist views. But just as certainly they can be strictly confined if we choose to do so. The examples involve treaties, duties arising from treaties, and actions taken in connection with what in the early Republic were regarded as foreign affairs. Of course the first amendment limits every power Congress has. But the dimensions of those limits may vary with the power at issue. It has classically been thought that limitations on the treaty and foreign powers were different from those on such other powers as the commerce or spending powers.[5] If that is so, Cord's

3. Cord does not note that Black's theory of the Constitution made it important for him to attribute his views to the framers. Since almost everyone knows that, commentators rightly take Black's invocations of history with a grain of salt.

4. 210 U.S. 50, 28 S. Ct. 690 (1908).

5. See, e.g., Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382 (1920). See also Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1045 (1953), whose rationale that due process limits

examples, while interesting, do not go far to establish a broader thesis about Congress's powers in general.

This in turn leads to a fourth characteristic of cranks. They routinely find it difficult to tolerate ambiguity. Cord provides two minor examples, and one major one, in his primary thesis which denies ambiguity in the history on which he relies. The first minor example comes in Cord's discussion of Madison's position regarding the constitutionality of Thanksgiving proclamations (pp. 29-36). After retiring from the Presidency, Madison wrote a memorandum, first published in 1946, explaining why he thought such proclamations unconstitutional. Cord points out that as President, Madison issued four Thanksgiving Day proclamations. To Cord, it would be "incongruous" to hold Madison's asserted constitutional views and still issue the proclamations (p. 32). "Were the pressures of the War of 1812 so great that Madison had to abandon his scruples and violate his constitutional oath of office by issuing four proclamations that he believed violated the *Constitution* of the United States?" (p.31). I am tempted to reply, "Sure, and that's exactly why we have judges with life tenure to decide constitutional questions." But that would assume away the ambiguity in the other direction. Historians know that the only answer is that Madison believed what he believed and did what he did. To search for some rational reconciliation of what appear to us to be inconsistent positions is to engage in an unhistorical enterprise.

The second example is less important, but it does indicate something about how Cord reads texts. Jefferson drafted a set of regulations for the University of Virginia. They assumed that some religious groups might establish sectarian schools adjacent to the University, and stated that if any student at such a school also attended the University—today we would call this cross-registration—they would be entitled to the rights of University students. The regulations also provided that University students "will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University, at its stated hour" (quoted at p. 135). Cord somehow takes this to be a square endorsement by Jefferson of state support of religion (see also pp. 136-41). I find it more natural to read it as a statement that students at the University who are religious will of course be allowed to attend church services that do not conflict with the schedules. I concede that Jefferson's stated "expectation" introduces some ambiguity. But ambiguity is what it is, not conclusive evidence against the more natural reading of the regulation as a whole.

Congress's power to make rules for the armed forces in ways different from the way it limits its other powers suggests caution in making too much of the early provisions for military chaplains. Id. at 140-42, 73 S. Ct. at 1048-49.

The third example of Cord's inability to tolerate ambiguity goes to the heart of his historically based argument about the Constitution's meaning. He relies on history to support a version of Philip Kurland's "neutrality" thesis: the government may use nonpreferential religious means to accomplish secular goals. The early grants to religious organizations and the early treaties show Congress doing just that.

Unfortunately for Cord's position, they also show a number of other things. First, all of Congress's actions involved support of Christian sects. Thus, the historical evidence supports the proposition that Congress may use *only* Christian religious means to accomplish secular goals (see, e.g., pp. 80, 132). For obvious reasons Cord finds this proposition unacceptable as a matter of normative constitutional law. He attempts to salvage his thesis by noting that at the time of the framing there were minute numbers of non-Christians in the country, so the "Christian means" was extensionally equivalent to "non-discriminatory means" (p. 161). Because there are now substantial numbers of non-Christians, we should adopt the "nonpreferential means" interpretation (pp. 162-65; see also pp. 191-93). Perhaps so, but Cord's historical analysis cannot support that choice, which is, after all, between two interpretations that were extensionally equivalent at the time in question but have become nonequivalent by now.[6]

Second, all of Congress's actions involved support of religion in a setting where there was no substantial opposition to such support. Thus, the historical evidence supports the proposition that Congress may use nonpreferential means, and so on, only where there is no substantial opposition.[7] Cord rejects the "Christian means" interpretation of the evidence because of the growth of religious pluralism. One could just as easily reject Cord's "nonpreferential means" interpretation because of the growth of secular opposition to even nonpreferential support of religion. The historical evidence just will not bear the weight Cord places on it.

There are lots of interesting things to say about the law of church and state. Cord says very few of them. The discussion will surely proceed essentially untouched by his work. And properly so.

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6. I should note that, while Cord may be correct in saying that there were few non-Christians—that is, few Jews, Buddhists, and so on—in the country at the end of the eighteenth century, there certainly were a lot of rather secular agnostics, of whom Jefferson and Madison were among the most prominent. The notion of "non-preferential" treatment among religious sects, supported by Cord's "few Jews" proposition, cannot readily be accommodated to the existence of a significant agnostic population.

7. Cord could have strengthened his argument if he had a better sense of the religious history of this country. Looking back from today, Cord seems to think that all Christian sects are pretty much alike. The framers lived in a world in which differences among Baptists, Methodists and Anglicans—not to mention Catholics—were very serious indeed. Achieving a rule of nonpreferential treatment would have been a major advance for the cause of religious toleration.